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IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, et al., *Petitioners,*
v.
GEORGE W. BUSH, et al., *Respondents,*

KHALED A.F. AL ODAH, et al., *Petitioners,*
v.
UNITED STATES OF AMERICA, et al, *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* AMNESTY INTERNATIONAL, HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, INTERNATIONAL LAW ASSOCIATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI

Pursuant to Rule 36 of the Rules of this Court, Amnesty International, the Human Rights Institute of the International Bar Association, the International Federation for Human Rights, and the International Law Association respectfully submit this brief as *amici curiae* in support of Petitioners. The interests of *amici* are set forth in Appendix "A" hereto.[1]

SUMMARY OF ARGUMENT

The Military Commissions Act of 2006 ("MCA") purports to eliminate federal court jurisdiction "to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Pub. L. No. 109-366, § 7(a), 120 Stat. 2600 (2006).

Amici respectfully urge this Court to find that by denying the availability of the writ of habeas corpus to Petitioners and similarly situated detainees, the MCA is an unconstitutional suspension of the writ that is also in direct conflict with the United States' obligations under international law.

The right to challenge the lawfulness of one's detention before a competent, independent and impartial

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[1] Amici state that no party or their counsel has authored this Brief in whole or in part nor has any person or entity other than *amici* and their counsel made monetary contribution to its preparation. All parties have consented to the filing of this Brief. Letters of consent have been lodged with the Clerk of the Court.

tribunal is a cornerstone of international human rights law. International human rights law, which is distinct from but complementary to international humanitarian law, applies to *all individuals* regardless of their location and status. Both as a matter of treaty and customary international law, the United States must accord individuals within its power or effective control, regardless of territorial boundaries or nationality, the rights protected by the relevant provisions of domestic and international law. *Amici* submit this brief to set forth the international legal framework that requires the United States to provide all individuals the right to effectively challenge the lawfulness of their detention.

In expressing its consent to be bound by the International Covenant on Civil and Political Rights ("ICCPR"), the United States affirmatively accepted the obligation that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, adopted Dec. 19, 1966, art. 9(4), 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) ("ICCPR"). The United States remains bound by its international obligations, including those arising under the ICCPR.

The right of individuals to challenge the lawfulness of their detention in a court is also a fundamental principle of customary international law. This customary rule is evidenced by widespread state practice, and is reflected in numerous treaties, other international instruments, and international and domestic jurisprudence.

International human rights law also defines the nature of a competent, independent, and impartial tribunal, which is the *sine qua non* of any meaningful review procedure. The Combatant Status Review Tribunals ("CSRTs") were set up

by the United States, more than two years after detentions began in Guantánamo, following this Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), to determine whether each detainee being held in Guantánamo was "properly detained as an enemy combatant."

The CSRTs, however, fall far short of the international legal requirements for a competent, independent, and impartial tribunal administered under procedures which safeguard due process, in several important respects. Accordingly, detainees are precluded by the CSRTs' composition, procedural deficiencies and narrow subject matter jurisdiction from presenting a meaningful and effective challenge to the factual and legal basis for their detention.

The Court of Appeals' decision, which serves to deprive hundreds of individuals of their right to pursue their petitions for habeas corpus to challenge the legality of their detention, cannot be reconciled with the United States' obligations under international law.

I. INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW PROVIDE A SEAMLESS FRAMEWORK OF LEGAL PROTECTION FOR ALL INDIVIDUALS.

For over five years, the United States has subjected hundreds of individuals at the Guantánamo Bay Naval Base in Cuba to indefinite detention without charge or trial. Many detainees were taken into custody in Afghanistan and Pakistan during the international and non-international armed conflicts in Afghanistan, but an unknown number were detained far from any battlefield in a variety of other countries, including the Petitioners in *Boumediene* who were seized in Bosnia-Herzegovina.

None of the individuals detained in Guantánamo is a citizen of a nation presently at war with the United States.

As of August 22, 2007, there were approximately 355 detainees remaining in indefinite detention without charge at Guantánamo.[2] None of these detainees had had the lawfulness of his detention reviewed by a court of law. All except four detainees transferred to the base in 2007 had reportedly had final CSRT decisions in their cases. A CSRT affirmation of "enemy combatant" status represents a potential life sentence for a detainee. As the District Court noted, "[i]t is the government's position that in the event a conclusion by the tribunal that a detainee is an 'enemy combatant' is affirmed," the United States is legally permitted "to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 451 (D.D.C. 2005). "At a minimum, the government has conceded that the war could last several generations." *Id.* at 465.

International human rights law and, where applicable, international humanitarian law, afford protection to all persons deprived of their liberty wherever detained. Human rights are inherent in the human person, as recognized by the Universal Declaration of Human Rights. Human rights treaty law applies to everyone within the territory or jurisdiction of the state concerned.

International humanitarian law, at times referred to as the law of war, does not displace international human rights

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[2] U.S. Department of Defense, Detainee Transfer Announced, No. 987-07, Aug. 9, 2007, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=11219.

law. In situations of armed conflict, where international humanitarian law is applicable, the two bodies of law complement one another. The law of war does not apply where there is no situation of armed conflict, such as in the case of those Petitioners taken into United States custody in Bosnia-Herzegovina in January 2002 and transported to Guantánamo Bay. However, for detainees who are legitimately subject to the law of war, international humanitarian law constitutes *lex specialis*, or specific guidance, for the implementation of human rights guarantees.

For example, while human rights law prohibits the arbitrary deprivation of any person's life or liberty, international humanitarian law may be relevant in determining what is arbitrary in a situation of armed conflict. The International Court of Justice ("ICJ") has held that human rights law "does not cease in times of war . . . . The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict[.]" Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).[3]

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[3] *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (explaining that "the protection offered by human rights conventions does not cease in case of armed conflict"); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 (Dec. 19, 2005); Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 11 (2004) ("While . . . more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.") ("General Comment 31");

Therefore, an individual detained in connection with an armed conflict is protected both by international humanitarian law and international human rights law. Those detained while participating in hostilities during the international armed conflict in Afghanistan (between October 7, 2001, and the establishment of the new government on June 19, 2002) may be entitled to protection under international humanitarian law relating to international armed conflict, while those detained after June 19, 2002, in the context of an ongoing armed conflict in Afghanistan are entitled to the protections relating to non-international armed conflict. All of the detainees, including those detained outside of armed conflict (international and non-international), are protected under the provisions of international human rights law.

II. INTERNATIONAL HUMAN RIGHTS LAW AFFORDS ALL INDIVIDUALS THE RIGHT TO CHALLENGE THE LEGALITY OF THEIR DETENTION BEFORE A COURT.

The right to be free from arbitrary detention is a universally recognized legal norm, essential for upholding the inherent dignity of all human beings and reaffirmed in every

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Inter-American C.H.R., Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures, (March 13, 2002) ("It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. . . . Further, in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another[.]").

major human rights treaty.[4] This right is also a binding rule of customary international law.

The United States invoked the universal prohibition on arbitrary detention before the ICJ almost thirty years ago, proclaiming that there is "a responsibility under international law, independent of any specific treaty commitment" to adhere to a "minimum standard of treatment which is recognized by the international community as due to all aliens," under which "aliens are entitled to be free from arbitrary . . . arrest and detention." *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), Memorial of the Government of the United States of America, 181-182 (1980). The duty of every state to respect these rights, including the right not to be arbitrarily detained, is "reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights." *Id.*

Over the course of the three decades since the United States made this argument before the ICJ, the international community has continued to recognize and promote the

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[4] *See* ICCPR, art. 9; American Convention on Human Rights, Nov 22, 1969, art.7(3),(5),(6), 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force July 18, 1978) ("ACHR"); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5(1),(4), 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) ("ECHR"); African Charter on Human and Peoples' Rights, June 27, 1981, arts. 6, 7(1), O.A.U. Doc. CAB/LEG/67/3/rev. 5 (entered into force Oct. 21, 1986) ("African Charter"); League of Arab States, Revised Arab Charter on Human Rights, May 22, 2004, art. 14 (1)(2)(6), *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005) ("Arab Charter").

universal prohibition on arbitrary detention. As of August 22, 2007, 160 countries, including the United States, had become party to the ICCPR, which guarantees everyone the right not to be arbitrarily detained and obligates every state party to provide meaningful judicial review of the legality of all detention. The United States continues to assert that the ICCPR "is the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[5]

The United States has repeatedly joined in consensus resolutions addressing arbitrary detention adopted by the former U.N. Commission on Human Rights. In a 2005 resolution, the Commission encouraged all states "[t]o respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful," and also "to ensure that [this right] is equally respected in cases of administrative detention, including administrative detentions in relation to public security legislation."[6]

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[5] Opening Statement to the U.N. Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of US Delegation, Geneva, Switzerland, July 17, 2006, *available at* http://www.state.gov/s/p/rem/69126.htm.

[6] Arbitrary Detention, Human Rights Resolution 2005/28, *available at* http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN 4_RES-2005-28.doc

Such judicial review, in the form of habeas corpus and similar procedures in other legal systems, is an indispensable safeguard of the fundamental right of every person not to be illegally or arbitrarily detained.[7] "[T]he cornerstone guarantee . . . is that a detainee must have the right to actively seek judicial review of his detention." *Rakevich v. Russia,* Eur. Ct. H.R., App. No. 58973/00, ¶ 43 (2003).

The rule of law requires that the judiciary play a fundamental role in protecting the right to liberty and security of person inherent in every human being. The United Kingdom House of Lords (Law Lords), despite the continuing threat of terrorism, recently reaffirmed that "neither the common law, from which so much of the European Convention is derived, nor international human rights law allows indefinite detention at the behest of the executive, however well-intentioned." *A and others v. Secretary of State for the Home Department*, 2 AC 68, ¶ 222 (U.K.H.L. 2005). As the court explained, "[o]nly the courts can [authorize such detention] and, except as a preliminary step before trial, only after the grounds for detaining someone has been proved. Executive detention is the antithesis of the right to liberty and security of person." *Id.*

The United States has affirmatively accepted the right to access to a competent and independent court to challenge the legality of detention as a treaty obligation. Article 9 (4) of the ICCPR codifies the right of habeas corpus: "Anyone who

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[7] *See Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Inter-Am. Ct. H.R., Advisory Opinion OC-8/87 of Jan. 30, 1987 at ¶ 35) (finding that for habeas to serve its purpose a detained person must be brought before a competent judge or tribunal to "obtain a judicial determination of the lawfulness of a detention[.]").

is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[8] The U.S. Senate consented to ratification of the ICCPR, without any reservations, understandings, or declarations with respect specifically to Article 9 (4).

Moreover, the right to challenge the legality of one's detention is a universal human right that is based on the inherent dignity of every person and does not rest on narrow legal distinctions between types of people, places, or circumstances. *See, e.g.,* ICCPR Preamble ("these rights derive from the inherent dignity of the human person"); *accord*, United States Declaration of Independence (proclaiming "that all men are created equal; that they are endowed by their Creator, with certain inalienable rights").[9] None of the human rights treaties that codify the right to such

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[8] The ICCPR provides in Art. 2 (1) that its scope of application should extend to "all individuals within its territory and subject to its jurisdiction[.]" The ICJ has found that this provision "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory." Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 109. Thus, the ICJ agreed with the Human Rights Committee, the ICCPR's authoritative interpreter. *See* General Comment 31, ¶ 10 ("[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party[.]").

[9] *See also* Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (Ser. A) No. 9, ¶¶ 33-34 (1987) (holding that habeas corpus is among the "guarantees . . . derived from representative democracy as a form of government").

judicial review exempts any category of persons from its application.

This plain understanding has been repeatedly reaffirmed by the Human Rights Committee, the body of experts established under the ICCPR to monitor its implementation. For instance, when Finland argued that Article 9(4) of the ICCPR did not apply to members of the military detained under the military disciplinary codes where the maximum period was 15 days of close detention, the Committee observed that "the Covenant does not contain any provision exempting from its application certain categories of persons. . . . The all-encompassing character of the terms of [the Covenant] leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other." *Vuolanne v. Finland*, U.N. Human Rights Committee, Comm. No. 265/1987, ¶ 9.3, CCPR/C/35/D/265/1987 (1989); *see also* U.N. Human Rights Committee, General Comment 8, ¶ 1 (1982) ("[T]he right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.").

In addition to its treaty obligation under the ICCPR, the United States is bound by customary international law to respect the right to such judicial review. The right to be provided access to a court to challenge the legality of detention is clearly among the binding rules of customary international law as a key component of the prohibition on arbitrary detention. Rules of customary international law are binding and arise from practices that states generally follow from a sense of legal obligation. *See* Restatement (Third) of Foreign Relations Law § 102 (2) (1987). The ratification and adoption of numerous treaties and international instruments,

as well as consistent state practice, demonstrate that States understand this right to be a matter of legal obligation.

The universal recognition that judicial review is an essential component of the right not to be arbitrarily detained is reflected in Article 9 (4) of the ICCPR and in the fact that all regional human rights instruments contain similar provisions.[10] The widely-held understanding of this right is that it does not apply only to criminal defendants, or only to citizens, but to *anyone* who is deprived of liberty. The United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment affirms that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority." G.A. Res. 43/173, U.N. Doc. A/43/49, Principle 11.1 (1988).[11]

The right to such judicial review is also recognized by states around the world, including those that have faced terrorism and other serious security threats for decades. Regional human rights bodies have consistently held that individuals suspected of engaging in such activities retain their fundamental rights, including the right to challenge the legality of their detention before a competent and independent court. For instance, in the landmark *Castillo Petruzzi* case, the Inter-American Court of Human Rights held that despite "a terrible disruption of public law and order . . . with acts of terrorism that left many victims in their wake," Peru's holding of four suspected terrorists without the right to access to a

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[10] *See* ACHR, arts. 7(3),(5),(6); ECHR, arts. 5(1),(4); African Charter, art. 7(1); Arab Charter, art. 14(6).

[11] Adopted by U.N. General Assembly Resolution 43/173 of 9 December 1988.

court for habeas corpus proceedings violated their right against arbitrary detention. *Castillo Petruzzi et al. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶¶ 109-12 (1999). *See also Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples' Rights, Comm. Nos. 222/98 and 229/99 (2003) (upholding accused terrorists' right not to be arrested and detained without charge) ("ACHPR").[12]

The drafters of the major human rights treaties specifically contemplated situations in which states would legitimately seek to limit the scope of certain rights in exigent circumstances and included provisions permitting states to formally derogate from some provisions during public emergencies. ICCPR, art. 4; ACHR, art. 27. The established rule is that states may derogate from particular obligations formally and publicly, and that derogations must be temporary, non-discriminatory, and narrowly tailored to the extent that is strictly necessary to meet a specific threat to the life of the nation.[13] However, even applying these strict

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[12] *See also* Commission on Human Rights, Situation of Detainees at Guantánamo Bay, U.N. Doc. E/CN.4/2006/120 (2006) (report of five experts to the UN Commission on Human Rights) ("U.N. Experts Guantanamo Report").

[13] U.N. Human Rights Committee, General Comment 29, States of Emergency, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶ 2 (2001) ("General Comment 29") ("Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency."); *see also Brannigan and McBride v. United Kingdom*, 17 Eur. H.R. Rep. 539 (1993).

conditions, the right to challenge the lawfulness of one's detention can never be the object of derogations.

The U.N. Human Rights Committee, for example, considered whether curtailment of such judicial review is permissible under the ICCPR in situations of emergency. It determined that the provisions of Article 9 must be respected at all times. "States parties may in no circumstance invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty". General Comment 29, ¶ 11. The Committee has also stressed that "a State party may not depart from the requirement of effective judicial review of detention." *Id.* at n.9. In any event, the United States has never proclaimed either a state of emergency as would be recognized under Article 4 of the ICCPR or an intent to derogate from any of the provisions of the ICCPR.

In addition to protecting the right of all persons to be free from arbitrary deprivations of liberty, judicial review also protects against other fundamental rights violations such as enforced disappearance, torture, and other cruel, inhuman and degrading treatment.[14] "In order to protect non-derogable

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[14] U.N. Committee Against Torture, Conclusions and Recommendations on the Second Periodic Report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, ¶ 22 (2006) ("[D]etaining persons indefinitely without charge [at Guantanamo Bay] constitutes per se a violation of the Convention [Against Torture]"); *see also Habeas in Emergency Situations* at ¶ 35 ("[H]abeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment."). *See also*, Guidelines on

rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." General Comment 29, ¶ 16. *See also Coard v. United States*, Inter-Am. C.H.R., Case No. 10.951, 109/99 (1999); ACHR, art. 27 (2) (prohibiting suspension of "the judicial guarantees essential for the protection of" other non-derogable rights); *Habeas Corpus in Emergency Situations*, ¶¶ 36, 42 (holding that the right of habeas corpus is non-derogable for this reason); General Comment 29, ¶¶ 15-16 ("It is inherent in the protection of rights explicitly recognized as non-derogable . . . that they must be secured by procedural guarantees, including, often, judicial guarantees.").

Therefore, as a matter of treaty and customary law, wars – however defined – and other emergencies do not justify a state's abandonment of its human rights obligations.

III. COMBATANT STATUS REVIEW TRIBUNALS ARE NOT AN ADEQUATE SUBSTITUTE FOR HABEAS CORPUS REVIEW UNDER INTERNATIONAL LAW.

In June 2004, this Court held in *Rasul v. Bush* that federal courts have jurisdiction to hear Guantánamo detainees' habeas petitions. 542 U.S. 466 (2004). In response

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Human Rights and the Fight Against Terrorism, Committee of Ministers of the Council of Europe, Sec. 7, ¶ 3, July 11, 2002 ("A person arrested or detained for terrorist activities must be able to challenge the lawfulness or his/her arrest and of his/her police custody before a court.").

to *Rasul* and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Administration established the Combatant Status Review Tribunals ("CSRTs") as its proposed means of providing Guantánamo detainees with some form of review of their classification as "enemy combatants."

The CSRTs themselves must be measured against the standards for a competent, independent, and impartial tribunal, because international law requires that detainees be able to access a court to challenge their detention, not merely be provided with appellate review of an administrative review procedure. The CSRTs fail to measure up to these standards.

The CSRTs consist of panels of three military officers who are "not bound by the rules of evidence such as would apply in a court of law" and may consider any information – including classified, hearsay, and coerced information – in making their determination as to whether, by a "preponderance of the evidence", the detainee is "properly detained as an enemy combatant".[15] The detainee is not entitled to legal counsel and is not entitled to have access to or know the details of any classified evidence used against him. There is a presumption that the Government Information submitted to the CSRT in support of the detainee's classification as an "enemy combatant" is "genuine and accurate."[16]

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[15] Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal, Deputy Secretary of Defense, July 7, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf ("CSRT Order").

[16] Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006, *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf ("Implementation of CSRT Procedures").

In its concluding observations in 2006 on United States compliance with the ICCPR, the U.N. Human Rights Committee said: "The Committee is concerned that, following the Supreme Court's ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs)...may not offer adequate safeguards of due process," and noted in particular, "their lack of independence from the executive branch and the army, restrictions on the rights of detainees to have access to all proceedings and evidence, the inevitable difficulty they face in summoning witnesses, and [their capacity] to weigh evidence obtained by coercion for its probative value."[17]

The United States "should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantánamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful." *Id.* With respect to the composition of such a court, the Committee noted that "due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard." *Id.*

The limited judicial review of finalized CSRT decisions provided under the Detainee Treatment Act of 2006 ("DTA") does not cure the CSRTs of their fundamental flaws or provide those held in Guantánamo with access to remedy, as required under international law. Pub. L. No. 109-148, 119

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[17] Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, July 10-28, 2006.

Stat. 2939 (2006). The DTA limits the scope of review, allowing jurisdiction only over whether a CSRT was "consistent" with its own deficient "standards and procedures[,]" § 1005 (e)(2)(C)(i), and whether those procedures are consistent with the Constitution "to the extent the Constitution and the laws of the United States are applicable[.]"§ 1005 (e)(2)(C)(ii). Thus, the appellate review provided under the DTA, which purports to prohibit fact-finding by the reviewing court, is severely limited. Furthermore, the DTA provides that "[n]othing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States." § 1005 (f).

The CSRT process falls far short of the international law standards embodied in ICCPR Article 9 (4), analogous international treaty provisions and customary law.[18] Courts and human rights bodies have interpreted Article 9 (4) and similarly worded provisions in regional human rights instruments to identify the minimum procedural guarantees to which detainees are entitled in challenging the lawfulness of their detention under international law. In the sections below, *amici* demonstrate that the CSRTs, in respect of their composition, powers, competencies and procedures, fail to meet these international standards.

The reasons why the CSRTs and the DTA review of their decisions does not provide a meaningful substitute for habeas corpus are set out at length in the briefs of the

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[18] ECHR, art. 5(4) employs nearly identical language as ICCPR, art. 9(4) and the case law interpreting 5(4) is cited in this brief to reflect findings on the customary law underlying the common principles of the ECHR, ICCPR and ACHR, art. 7(6) and Arab Charter, art. 14 (6).

Petitioners and several of the other *amici*. This brief will not repeat the discussion of those issues that appear elsewhere. *Amici* here address below only some of the most glaring structural defects of the CSRTs.

A. Competence of the Tribunal

Article 9(4) of the ICCPR requires that the presiding court must provide fundamental guarantees of judicial procedure and that the scope of judicial review must be wide enough to allow for an examination of all the conditions essential for lawful detention.[19] A competent court is one that can determine the legality of the deprivation of liberty and that has the authority to order the release of the detainee. ICCPR, Art. 9(4).[20]

Even when a detainee is determined by the CSRT not to be an "enemy combatant," the CSRT does not have the power to order the detainee's release.[21] The Court of Appeals

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[19] *A v. Australia*, U.N. GAOR, 59th Sess., U.N. Doc. CCPR/C/59/D/560/1993 (1997)(Mr. Bhagwati concurring) (explaining that "article 9, paragraph 4, which embodies a human right ... must be interpreted broadly and expansively"); *see also E. v. Norway*, App. No. 9278/81 & 9415/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30 (1984).

[20] *A v. Australia*, at ¶ 9.5 ("[W]hat is decisive for the purposes of [art. 9(4)] is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful,' article 9, paragraph 4, requires that the court be empowered to order release . . . .").

[21] For example, three of the thirty-eight detainees found not to be "enemy combatants" in the 558 CSRT decisions finalized by

is likewise given no authority under the DTA to order the release of the detainee if the CSRT procedures are found not to have been properly applied. The detainee will simply be returned to executive detention and perhaps another CSRT.

The court must be competent to satisfy the international obligation to provide the right to a remedy. As provided in ICCPR Article 2.3, a State must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

The U.N. Human Rights Committee has found that failure to comply with the requirements of right to judicial review under ICCPR 9(4) can also constitute a denial of a right to an effective remedy.[22]

B. Independence of the Tribunal

In order to ensure effective protection against arbitrary detention and to respect procedural fairness, including within the meaning of Article 9(4), the court before which detainees

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March 2005 were still in Guantánamo twenty months later, before being sent to Albania on or around November 16, 2006. Department of Defense, News Release, *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204.

[22] *Luyeye Magana ex-Philibert v. Zaire*, Comm. No. 90/1981, U.N. Doc. CCPR/C/OP/2, ¶ 124 (1990); *Baritussio v. Uruguay (Carmen Amendola Masslotti and Graciela Baritussio v. Uruguay*, Comm. No. R.6/25, U.N. Doc. Supp. No. 40, A/37/40, ¶ 187 (1982)). *See also Castillo Petruzzi et al v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 52, ¶¶ 174,188 (1999).

challenge their detention must function independently of any other branch of government – in this case especially the Executive who is empowered to order the detention – and must be sufficiently impartial to fulfill the requirements of the provision.[23] International bodies have consistently underscored the fundamental nature of this requirement.[24]

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[23] *Weeks v. United Kingdom*, App. No. 9787/82 (1987), 10 Eur. Comm'n H.R. Rep. 293, ¶ 61 (1987) ("The 'court' . . . does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. The term denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the 'guarantees' 'appropriate to the kind of deprivation of liberty in question' – 'of [a] judicial procedure', the forms of which may vary but which must include the competence to 'decide' the lawfulness of the detention and to order release if the detention is unlawful."); *Murat Satik and others v. Turkey*, Eur. Ct. H.R., App. No. 31866/96, ¶ 31 (2002); *Habeas Corpus in Emergency Situations*, ¶¶ 30-32; ACHPR, Principle M (5(e)) of the Principles and guidelines on the right to a fair trial and legal assistance.

[24] *Torres v. Finland*, U.N. Human Rights Committee, Comm. No. 291/1988, ¶ 7.2 (1990) ("[T]he committee has taken note of the State party's contention that the author could have appealed the detention orders ... to the Ministry of the Interior. In the Committee's opinion, this possibility ... does not satisfy the requirements of [art. 9(4)], which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control."); *Vuolanne v. Finland*, U.N. Human Rights Committee, Comm. No. 265/1987, at ¶ 9.6 ("[W]henever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that [art. 9(4)], obliges the State party

CSRT panels, which are composed entirely of military personnel whom the Executive can "control [and] direct ... is incompatible with the notion of an independent and impartial tribunal." *Olo Bahamonde v. Equatorial Guinea*, Comm. No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991, ¶ 9.4 (1993). Therefore, CSRTs are a legally inadequate forum for detainees to challenge their detention.

C. Procedural Deficiencies Undermining Fairness

1. Right to be Informed of the Basis for One's Detention

Detainees must be informed of the basis for their detention so that they can respond to arguments brought forward by the detaining authority. ICCPR, Art. 9 (2), (4). *See also Sanchez-Reisse v. Switzerland*, 9 Eur. H.R. Rep. 71, ¶ 51 (1987); *Trzaska v. Poland*, Eur. Ct. H.R., No. 25792/94, ¶ 78 (2000); *Toth v. Austria*, 14 Eur. H.R. Rep. 551, ¶ 84 (1991). A fair hearing is not possible if detainees are "denied access to those documents in the investigation file which are essential in order to effectively challenge the lawfulness of [one's] detention."*Lamy v. Belgium*, Eur. Ct. H.R., No. 19444/83, ¶ 29 (1989).

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concerned to make available to the person detained the right of recourse to a court of law . . . ."); *see also Keus v. Netherlands*, 13 Eur. Ct. H.R. Rep. 700, App. No. 12228/86, ¶ 28 (1990); *Lawless v. Ireland*, 1 Eur. Ct. H.R. (Ser. A, No. 3) (1961); *Ireland v. UK*, 25 Eur. Ct. H.R. (Ser. A) (1978); *Amnesty International and Others v. Sudan*, African Comm. on Human and Peoples' Rights, Comm. Nos. 48/90, 50/91, 89/93, ¶ 60 (1999).

The CSRT process violates this principle of Article 9 (2), (4) because the Government is not required to provide detainees with the information which forms the basis of the executive's determination of their "enemy combatant" status.[25] CSRTs merely require that a detainee be notified of any *unclassified* factual basis for his or her detention. CSRT Order (g)(1). The Government enjoys the discretion to determine what information is classified, and the vast majority of the information regarding "enemy combatant" status is deemed classified. *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468 ("[I]t appears that all of the CSRT's decisions substantially relied upon classified evidence.").

Detainees have an internationally recognized right to have access to information on which their detention is based. *See e.g., Lietzow v. Germany*, Eur. Ct. H.R., No. 24479/94 (2001) (finding a violation of article 5(4) because the defense had no access during hearings on detention to the prosecution files with statements of two witnesses – the basis on which the prosecution and the court relied in ordering detention).

A court examining a challenge to the legality of detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties. Equality of arms is not ensured if the detainee is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of the detention. *See, e.g., Lamy v. Belgium*, Eur. Ct. H.R., No. 19444/83, ¶ 29

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[25] "The detainee's Personal Representative only "*may* share the unclassified portion of the Government Information with the detainee." Implementation of CSRT Procedures, § F(8), July 14, 2006 (emphasis added).

(1989); *Nikolova v. Bulgaria*, Eur. Ct. H.R., App. No. 31195/96, ¶ 58 (1999).

2. Right to Be Represented by Counsel

Though the right to be represented by counsel in the course of challenging one's detention is not expressly enumerated in Article 9(4) or corresponding provisions in regional conventions and other international instruments, case law and state practice interpreting the right to judicial review assert that the right to be represented and present a defense is a fundamental guarantee.[26]

In its concluding observations in 2006 on United States compliance with the ICCPR, in relation to the Guantánamo detainees' rights under Article 9(4) to take proceedings before a court without delay to determine the lawfulness of their detention, the UN Human Rights Committee found that "access of detainees to counsel of their choice . . . should be guaranteed in this regard."[27]

For the CSRT process, however, the detainee "shall not be represented by legal counsel." Implementation of CSRT Procedures, July 14, 2006, Enclosure 1, Sec. F(5). Instead, the detainee is provided with a government-selected Personal Representative (PR) who is a commissioned officer

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[26] *Hammel v. Madagascar*, U.N. Human Rights Committee, Comm. No. 155/1983, ¶ 18 (1987) ("[t]he state party should ensure that all aspects of detention, including the period of detention and availability of legal aid, are administered in full compliance with article 9 of the Covenant.").

[27] Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, 2006.

in the U.S. Armed Forces and who "shall not be a judge advocate". Implementation of CSRT Procedures, July 14, 2006, Enclosure 3 §A(1). The PR's relationship with the detainee is not confidential and he or she can be obligated to divulge to the CSRT any information provided by the detainee. *Id.* § D. As the District Court pointed out, "there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative." *In Re Guantanamo Detainee Cases,* 355 F. Supp. 2d at 472.

The fundamental requirement that detainees have access to legal counsel in challenging the lawfulness of their detention cannot be satisfied by mere assistance from a non-lawyer agent of the detaining Government who is chosen by the detaining Government. By depriving the detainees of counsel, the CSRTs violate both international human rights treaties and customary international law.

3. Right to Be Present at the Hearing and the Right to Confront Accusers

Article 9(4) and corresponding provisions in other treaties require that detainees be afforded the right to be present to challenge their detention and the right to confront their accusers. "The proceedings must be adversarial and must always ensure 'equality of arms' between the parties . . . ." *Garcia Alva v. Germany*, Eur. Ct. H.R., App. No. 23451-94, ¶ 39 (2001). Furthermore, both the government and the detainee must be given access to and the opportunity to contest evidence introduced in the proceedings. *Id.*

A detainee may elect to participate in the CSRT process or may waive such participation. Waiver can be

inferred by the PR from a detainee's "silence or actions when the Personal Representative explains the CSRT process to the detainee." Implementation of CSRT Procedures, July 14, 2006, § F(1). No assessment of any such detainee's psychological condition is required, including in the case of an individual who has been in indefinite detention for several years virtually incommunicado and confronted by a culturally unfamiliar administrative review system.

The CSRT is authorized to request only "reasonably available" information in the possession of the government bearing on the issue of whether the detainee meets the criterion of designation as an "enemy combatant," and detainees–held for years virtually incommunicado far from their home countries–may present only the testimony of witnesses deemed "reasonably available" and whose testimony is considered by the CSRT to be "relevant." Implementation of CSRT Procedures, July 14, 2006, §§ E(3), F(6).

The CSRT records demonstrate that the United States has failed to uphold procedural justice. In 102 CSRTs, the government did not present a single witness against a single detainee. Every request to call an un-detained defense witness was denied. Seventy-four percent of requests to call a detained defense witness were denied. In 96% of the CSRTs, the government did not present any documentary evidence to the detainee prior to the hearing. In 89% of the tribunals, absolutely no evidence was presented on behalf of the detainee. The analysis of these 102 CSRTs contains countless additional and equally disturbing statistics.[28]

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[28] Denbeaux and Denbeaux, *No Hearing Hearings, CSRT: The Modern Habeas Corpus?* Seton Hall Univ. School of Law, *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.

The CSRTs fail to ensure that detainees can be present to challenge their detention or that they have the opportunity to confront their accusers. Under CSRT rules, the government can exclude detainees from proceedings on national security grounds at its discretion. CSRT Order (g)(4). If the government classifies most or all information pertaining to a detainee's case, it effectively revokes the detainee's right to be present to challenge his or her detention. In addition, with the power to classify information, including testimony, and intelligence methods and activities used to obtain information, the government has the power to deny detainees the right to confront their classified accusers and their classified methods and activities.[29] CSRTs provide the detaining authority with exclusive control over detainees' right to attend their status tribunals and to confront their accusers. The government's exclusive control over, and consistent denial of these rights violates international law.

4. Obligation of State Not to Admit Coerced Evidence

Numerous allegations have come to light of torture and other cruel, inhuman or degrading treatment (ill-treatment) inflicted upon detainees held in Guantánamo, including in the custody of the United States or other governments prior to their transfer to the Naval Base. A number of detainees have alleged that they have made

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[29] *See, e.g.*, USA: Law and Executive Disorder: President Gives the Green Light to Secret Detention Program, August 2007, *available at* http://web.amnesty.org/library/pdf/AMR511352007ENGLISH/$File/AMR5113507.pdf.

statements as a result of torture, other ill-treatment or coercion.[30] International law prohibits the admission "in any proceedings" of information obtained under torture or other ill-treatment (except against a person accused of torture). *See* art. 15, CAT, Human Rights Committee, General Comment 20, ¶ 12, UN Doc. HRI/GEN/Rev.7 (1992).[31]

Prior to passage of the DTA, when the vast majority of CSRTs so far carried out were conducted, the tribunal was "free to consider any information it deem[ed] relevant and helpful to a resolution of the issues before it."[32] Admission of coerced information was neither prohibited nor subject to any

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[30] *See, e.g., In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473 ("[T]he CSRT did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees."); *see also Boumediene v. Bush*, Brief of *Amici Curiae* Retired Federal Jurists in Support of Petitioners' Supplemental Brief Regarding the Military Commissions Act of 2006, In the U.S. Court of Appeals for the District of Columbia Circuit, Nov. 1, 2006 ("The CSRT panels did little to evaluate the probity of allegedly coerced evidence. . . .A number of CSRTs simply ignored testimony that the detainee's prior statements to interrogators were the result of torture. . . .*Amici* are not aware of a single CSRT that permitted the prisoner to develop an evidentiary record regarding statements allegedly obtained by torture.").

[31] The United States ratified the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on October 21, 1994.

[32] Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, July 29, 2004. Encl. 1, § G(7).

inquiry to assess whether the information had been coerced. Under the DTA, CSRT's are to assess, "to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement." Thus, CSRTs may still rely upon information coerced from persons including detainees who have been questioned while held in incommunicado or secret detention and persons who have been subjected to torture and other forms of ill-treatment. Implementation of CSRT Procedures, July 14, 2006, Enclosure 10, §B.

CONCLUSION

As this Court has long held, international law is an integral part of United States law. *The Paquete Habana*, 175 U.S. 677 (1900). The United States has a long-stated tradition of providing "a decent respect to the opinions of mankind." The Declaration of Independence, ¶ 1.[33] This practice seeks to inform the interpretation and understanding of core legal principles, such as due process and fundamental fairness.

Many of this Court's rulings have relied in part on comparative analysis and consideration of the international

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[33] The U.S. Department of State has also recognized the relevance of international law for purposes of judicial inquiry. Indeed, "[e]ven when a treaty is 'non-self-executing,' courts may nonetheless take notice of the obligations of the United States thereunder in an appropriate case...." Committee against Torture, Consideration of Reports Submitted By States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5, ¶ 57 (2000).

obligations of the United States.[34] In *Atkins v. Virginia*, this Court noted the overwhelming disapproval of the world community in the imposition of the death penalty for offenders with mental retardation. 536 U.S. 304, 316 (2002). This Court found that such evidence "lends further support to our conclusion that there is a consensus among those who have addressed the issue." *Id.*

The uniformity of international opinion and international obligation on the issue of judicial access before the Court should be considered by this Court in deciding the important constitutional issues before it.

August 24, 2007 Respectfully Submitted,

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[34] *Roper v. Simmons*, 543 U.S. 551 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."); *Lawrence v. Texas*, 539 U.S. 558 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.").

APPENDIX

APPENDIX

AMNESTY INTERNATIONAL

Amnesty International Ltd is a company limited by guarantee. It aims to secure the observance of the Universal Declaration of Human Rights and other international standards throughout the world. It monitors law and practices in countries throughout the world in the light of international human rights and humanitarian law and standards. It is a worldwide human rights movement of some 1.8 million people (including members, supporters and subscribers). It enjoys Special Consultative Status to the Economic and Social Council of the United Nations and Participatory Status with the Council of Europe. Its mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression and freedom from discrimination, within the context of its work to promote all human rights. The organization works independently and impartially to promote respect for human rights, based on research and international standards agreed by the international community. It does not take a position on the views of persons whose rights it seeks to protect. It is concerned solely with the impartial protection of internationally recognized human rights.

HUMAN RIGHTS INSTITUTE OF THE INTERNATIONAL BAR ASSOCIATION

The Human Rights Institute of the International Bar Association helps to promote, protect and enforce human rights under a just rule of law, and works to preserve the

independence of the judiciary and legal profession worldwide. Founded in 1995, the Institute now has more than 7,000 members. The Institute was established by the International Bar Association, which was created in 1947, to support the establishment of law and the administration of justice worldwide, and is composed today of 30,000 individual lawyers and over 195 Bar Associations and Law Societies.

INTERNATIONAL FEDERATION FOR HUMAN RIGHTS

Established in 1922, the International Federation for Human Rights (FIDH) is a federation of 155 non-profit human rights organizations in more than 100 countries. FIDH coordinates and supports affiliates' activities at the local, regional and international level. FIDH strives to obtain effective improvements in the prevention of human rights violations, the protection of victims, and the sanction of their perpetrators. With activities ranging from judicial enquiry, trial observation, research, advocacy, and litigation, FIDH seeks to ensure that all international human rights and humanitarian law instruments are respected by State parties. FIDH also represents victims of grave crimes before the International Criminal Court in The Hague. Since 2002, FIDH has initiated and supported key proceedings before domestic courts and regional and international monitoring bodies in cases concerning arbitrary detention, torture, and other abusive practices undertaken in the context of the fight against terrorism.

INTERNATIONAL LAW ASSOCIATION

The Human Rights Committee of the American Branch of the International Law Association has a longstanding interest in the progressive development of the international legal order, the rule of law and the protection of fundamental human rights. It is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law. Members of the Human Rights Committee have taught subjects such as international law, foreign relations law, human rights law and constitutional law and have written extensively in these fields. They have participated extensively at the trial and appellate court levels, including the United States Supreme Court, and have litigated cases involving the rights of aliens under domestic and international law. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate on a variety of issues, including human rights treaties.